CHARLES L. JOHN

IBLA 78-137 Decided August 27, 1979

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F 13403.

Vacated and remanded.

1. Alaska: Native Allotments -- Indian Allotments on Public Domain: Lands Subject to -- Withdrawals and Reservations: Power Sites

   Lands included in an application for power site development under the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1976), shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, unless otherwise directed by the Federal Power Commission or by Congress.

2. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Contests and Protests: Generally -- Hearings: Generally -- Rules of Practice: Government Contests

   Where an applicant for a Native allotment alleges for the first time on appeal his use and occupancy of lands prior to their withdrawal, a decision rejecting the Native's application shall be vacated and the case remanded to BLM for its consideration of appellant's new evidence.

APPEARANCES: Roger E. Clark, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Charles L. John appeals from decisions of the Fairbanks District Office, Bureau of Land Management (BLM), dated January 21 and June 5, 1975, rejecting his application for a Native allotment. The lands sought by appellant are located in SE 1/4 sec. 12, T. 11 N., R. 17 E., Fairbanks meridian, Alaska. 1/

Appellant applied for an allotment in the above lands on February 9, 1971, under the Act of May 17, 1906, 34 Stat. 197, authorizing the Secretary of the Interior "to allot not to exceed one hundred sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age." This Act was repealed on December 18, 1971, with the passage of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1976), subject to applications pending on that date. Appellant's application alleged seasonal use and occupancy on the subject lands for hunting and trapping since September 1, 1964.

By notice dated May 8, 1974, BLM informed appellant that the subject lands were included in application F-030632, filed by the Director, U.S. Geological Survey, on January 9, 1963, to withdraw approximately 8,955,520 acres of public land in Alaska from all appropriations under the public land laws and to classify such lands for power site purposes as the Rampart Canyon Power Project. The notice further stated that PLO No. 3520 was published in the Federal Register on January 9, 1965, designating this area "Powersite Classification No. 445" (Yukon River near Rampart, Alaska). This classification, dated January 5, 1965, provided that the lands sought by appellant were to be subject to section 24 of the Federal Water Power Act of June 10, 1920, 16 U.S.C. § 791 (1976). The notice concluded by granting appellant 30 days in which to submit evidence of substantial use and occupancy begun 5 years prior to the filing of application F-030632 on January 9, 1963. Despite BLM's extension of this 30-day period to allow additional evidence to be submitted as

1/ The lands at issue are described in appellant's application as follows: "Beginning at approximate Latitude 65 degrees 47' 42" N; Longitude 144' 04' 43" W; and corner 1 of Sandy Roberts allotment; thence South 40 chains to corner 2; thence West 40 chains to corner 3; thence North 40 chains to corner 4 and corner 4 of Ervin John Jrs. allotment, thence Easterly to the point of beginning; . . . ."

late as January 10, 1975, appellant submitted no additional evidence to BLM. 2/

On January 21, 1975, BLM rejected John's application for a Native allotment, citing the withdrawal of the subject lands by application F-030632 on January 9, 1963. In a notice of appeal dated February 24, 1975, the Superintendent, Bureau of Indian Affairs (BIA), appealed this decision of BLM to the Board of Land Appeals.

Thereafter in a memorandum of March 28, 1975, to the Superintendent, BIA, the BLM State Director stated that "the superintendent is not a person privileged to practice before this Department on behalf of individual Native citizens resident in the area served by his office." The memorandum ended with the admonition that the decision of January 21, 1975, would be considered final, the Native allotment claims cancelled, and the cases closed if proper notices of appeal were not filed within the period set forth in the regulations. John's appeal was in fact dismissed by the State Office on March 28, 1975.

An appeal filed June 3, 1975, by Alaska Legal Services Corporation (ALSC) on John's behalf was summarily dismissed on June 5, 1975, as being untimely filed. On June 19, 1975, ALSC filed on behalf of John and others similarly situated a complaint (A75-111 Civil) in U.S. District Court for the District of Alaska challenging the rejection by BLM of BIA representation. 3/

Thereafter, in a memorandum dated September 26, 1975, the Deputy Solicitor, and the Director, Office of Hearings and Appeals, recommended to the Commissioner, Bureau of Indian Affairs, and to the Director, Bureau of Land Management, that Native allotment applications rejected in the circumstances which surrounded the putative appeal of Charles L. John be reinstated. In due course, BLM issued its decision of October 12, 1977, from which this appeal is taken.

2/ By way of explanation for appellant's failure to offer additional evidence during the period from May 8, 1974, to January 10, 1975, counsel for appellant states that "the time during which 'additional use and occupancy' statements ought to have been submitted was consumed by the confusion regarding the propriety of BIA representation; and it appears from the record that it was not until April of 1975 that Mr. John was actually contacted and specifically interviewed regarding the dates contained in the allotment application." P. 6, appellant's Statement of Reasons for appeal, Dec. 13, 1977.

3/ This litigation is still pending.

In his statement of reasons on appeal, John sets forth the following arguments:

1. The guideline announced by the Secretary of the Interior on October 18, 1973, requiring that an applicant complete 5 years of use and occupancy prior to withdrawal violates Administrative Procedure Act (APA) requirements for promulgating a rule.

2. The requirement that an applicant complete 5 years of use and occupancy prior to withdrawal applies only to allotments within national forests.

3. The operative date of withdrawal is the date on which PLO No. 3520 was published in the Federal Register.

4. Due process requires a hearing prior to final rejection of a Native allotment.

The guideline which appellant refers to in his first two arguments on appeal was announced by the Secretary on October 18, 1973, through Jack O. Horton, Assistant Secretary, Land and Water Resources. It stated in part:

> 2. Where a Native has not completed the five-year period of occupancy of lands prior to the effective date of a withdrawal or reservation of lands, the allotment application should be rejected. [Emphasis supplied.]

The basis for this guideline can be found at 43 U.S.C. § 270-3 (1970), since repealed, requiring an applicant to make "proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years." This requirement appears also in the regulations at 43 CFR 2561.2 (1978).

Appellant challenged the validity of the guideline by alleging a failure to comply with the requirements of the Administrative Procedure Act for promulgating a rule. 5 U.S.C. § 553 (1976). We need not pass on this question, however, for two reasons:

1. The guideline has been rescinded by Secretarial Order No. 3040, dated May 25, 1979.

2. Appellant does not allege use and occupancy until September 1, 1964, some 19 months after the filing of application F-030632 by the Director, U.S. Geological Survey, to withdraw the subject lands from entry, location, or other disposal and classify them for power site purposes.

[1] Contrary to appellant's third argument on appeal, the effective date of the withdrawal of the subject lands is January 9,

1963, rather than the publication date of PLO No. 3520 on January 9, 1965. PLO No. 3520 classified the lands sought by appellant subject to section 24 of the Federal Water Power Act of June 10, 1920, 16 U.S.C. § 791 (1976). Appellant's argument in favor of the 1965 publication date overlooks the plain language of the Act found at 16 U.S.C. § 818:

> Any lands of the United States included in any proposed projection under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress.

The lands sought by appellant were subject to the provisions of section 818 on January 9, 1963, upon the filing of application F-030632 by the Director, U.S. Geological Survey. Herman Joseph, 21 IBLA 199 (1975), Civ. No. F76-20 (D. Alas.). Appellant's use and occupancy commenced after that date were unauthorized and constituted a trespass. Native occupancy commenced at a time when the land is not subject thereto gives rise to no rights. Donald E. Miller, 2 IBLA 309, 314 (1971).

We note that appellant, in his statement of reasons on appeal, has now alleged use and occupancy begun in 1942, although also stating that he was absent from the land during the period from October 1958 until June 1969, because of employment outside of Alaska. 4/ Because appellant's new evidence of use and occupancy has not been previously examined by BLM, we remand this case to BLM. Appellant's submission that she had not been on the subject land for many years may be sufficient to establish prima facie that there has not been substantially continuous use and occupancy as required by the Act. Mildred Sparks, 42 IBLA 155 (1979). If BLM, after considering appellant's new evidence, intends to reject appellant's application, it shall follow the procedures set forth by the Court of Appeals for the Ninth Circuit in Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976):

> [A]pplicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

4/ Appellant's evidence is set forth as Exhibit A of his Statement of Reasons for appeal, Dec. 13, 1977.

In complying with the Pence requirements, BLM shall employ the procedures set forth in 43 CFR 4.451, the Government contest regulations. If, however, it shall find that the application must be rejected as a matter of law, it need neither serve a complaint nor provide a hearing. Donald Peters, 26 IBLA 235, 241 n.1, 83 I.D. 308, 311 n.1 (1976), reaffirmed, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976); Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978); John Moore, 40 IBLA 321, 324 n.1 (1979). Our discussion here disposes of appellant's fourth and final basis for appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded for action consistent with this opinion.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge